

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AMERICAN STOCK TRANSFER</b>	:	
<b>&amp; TRUST CO.</b>	:	DETERMINATION
	:	DTA NO. 819159
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1992 through November 30,	:	
1995.	:	

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Petitioner, American Stock Transfer & Trust Co., 6201 15<sup>th</sup> Avenue, Brooklyn, New York 11219, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through November 30, 1995.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 12, 2003 at 10:30 A.M., with all briefs to be submitted by September 30, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. ( Robert A. Maslyn, Esq., of counsel).

***ISSUES***

- I. Whether the Division of Taxation properly denied petitioner's refund application.
- II. Whether the assessment of tax was barred by the statute of limitations.

***FINDINGS OF FACT***

1. During the period December 1, 1989 through November 30, 1995, petitioner was a corporation providing stock transfer services to corporations from its office at 40 Wall Street, New York, New York. Specific services included, but were not limited to, issuing and registering stock certificates, maintaining shareholder accounts, distribution of cash payments, dividend reinvestment plan administration, solicitation of proxy votes for routine meetings and mailing year-end 1099 forms to shareholders.

2. On or about April 5, 1996, the Division of Taxation began a sales and use tax audit of petitioner with the mailing of an appointment letter which requested books and records pertaining to petitioner's sales tax liability for the period December 1, 1989 through November 30, 1995. An additional request for books and records was made on September 23, 1996.

3. In response to the request, petitioner provided Federal income tax returns for the years 1993, 1994 and 1995, and fixed asset schedules and invoices for the period December 1, 1992 through November 30, 1995 (the "audit period"). Petitioner never submitted any records for the period December 1, 1989 through November 30, 1992.<sup>1</sup>

4. After a review of petitioner's operations, the Division determined that petitioner was an unregistered vendor that was not required to file periodic sales and use tax returns. However, petitioner did make recurring expense purchases and fixed asset purchases on which tax was due, but not remitted.

5. After reviewing all the invoices for fixed asset purchases where sales and use taxes had not been paid, the Division determined the additional tax due thereon. For recurring expense

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<sup>1</sup>Ultimately, the two time periods became separate cases. The earlier period was protested and was disposed of at the Division's Bureau of Conciliation and Mediation Services. The latter period is the subject of the instant petition.

purchases, the Division procured a consent to conduct a test period audit, dated June 15, 1998, and examined detailed records for the period June through November 1995. The results of this test were projected over all quarters of the audit period to arrive at additional sales and use tax due on recurring expense purchases.

6. Based on its determinations of additional tax on fixed asset purchases and recurring expense purchases for the audit period, the Division calculated total additional tax due of \$153,864.46 and issued a Statement of Proposed Audit Change for Sales and Use Tax. On September 21, 1999, petitioner, by its representative, executed the consent to the tax contained on the statement of proposed audit change, and submitted a total payment in the sum of \$245,954.72.

7. On or about May 9, 2001, petitioner filed a claim for refund of the sales and use tax paid, stating that the Division's assessment was issued for a period not subject to audit and barred by the statute of limitations. By letter dated January 4, 2002, the Division denied the claim for refund without explanation.

### ***CONCLUSIONS OF LAW***

A. Petitioner does not dispute the amount of tax determined to be due or the fact that it failed to pay sales or use tax on certain recurring and fixed asset purchases. The certainty of these conclusions is underscored by petitioner's execution of the test period audit method election and its consent to the assessment of tax determined on the audit. Rather, after paying the tax and interest due, petitioner's refund application contended that the audit period was not "subject to audit" and the assessment was barred by the statute of limitations. Both of these arguments are meritless.

B. Petitioner argues that there was no period which the Division of Taxation could properly audit because it was not a registered vendor. However, petitioner is not shielded from tax liability or audit by the fact that it is unregistered. Tax Law § 1132(c) states that every sale is presumed taxable until the contrary is established and that the burden of establishing whether a receipt is taxable or not rests upon the vendor or the customer. (*See also* 20 NYCRR 533.2[a].) The clear implication is that a customer or user must prove to the Division of Taxation that it paid tax on its purchases of tangible personal property and that such a demonstration of proof would occur in the context of an audit. In fact, the regulation at 20 NYCRR 533.2(a)(2) states that “[u]pon audit by the department . . . the . . . user must present all records . . . [of purchases it claims to be exempt from taxation] as the department may request.” Since the express purpose of Tax Law § 1132(c) is to prevent evasion of tax, it follows logically that the Division would be cloaked with the authority to confirm adherence to the statutes and regulations through auditing of customers and users. Acceptance of petitioner’s position would prevent the Division from carrying out its responsibility of assuring compliance with the Tax Law, a result which is contrary to public policy. Therefore, petitioner’s argument that the period was not subject to audit must fail.

C. Petitioner made an alternate argument that since it was not making taxable sales and was not required to register as a vendor it was not required to keep records. Petitioner’s rationale for this position was rooted in its reading of the Division’s Publication 750, *A Guide to Sales Tax in New York State*, wherein it stated that registered vendors were required to keep detailed records of all sales. From this statement, petitioner reasoned that if registered vendors were required to keep detailed records, then unregistered vendors were not. Petitioner offered no additional support for its contention and did not explain how its reasoning was consistent with

the record keeping requirements associated with the burden of proof set forth in Tax Law § 1132(c) or 20 NYCRR 533.2(a)(2). In fact, its argument is not consistent with these provisions as discussed above and is rejected.

D. Petitioner failed to pay tax on or file returns with respect to certain of its purchases of fixed assets and recurring purchases, conceded by its execution of a consent to the tax found due.

Tax Law § 1133(b) provides:

Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission *and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid.* (Emphasis added.)

Further, the regulations specify that unregistered vendors like petitioner must file a return upon purchasing tangible personal property and pay the proper tax thereon. The regulation at 20 NYCRR 531.6 states, in pertinent part, as follows:

(a) Any person, not required to file periodic returns under section 533.3(a) of this Title, who purchases or uses property or services subject to the compensating use tax must file a Purchaser's Report of Sales and Use Tax. Also, any person not required to file periodic returns who purchases or uses property or services subject to the sales tax and who has not paid the tax to the seller must file a Purchaser's Report of Sales and Use Tax.

(b) The Purchaser's Report of Sales and Use Tax must be filed and tax paid within 20 days from the date that:

(1) a purchase of property or services subject to tax and upon which tax was not paid was made . . . .

Since petitioner never filed a return as required by law, there are no time limits on the assessment of tax on the receipts which should have been reported on those returns. (Tax Law §

1147[b].) Therefore, petitioner's argument that the proposed assessment contained in the statement of proposed audit change was barred by the statute of limitations must fail.<sup>2</sup>

D. The language of agreement in the statement of proposed audit change executed by petitioner has been construed to be a consent as defined by Tax Law § 1138(c). (*Matter of Sica Electrical & Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998.) As the Tribunal stated in *Sica*:

Once a taxpayer or a taxpayer's representative is provided an opportunity to review the audit papers and proposed consent to tax and, thereafter, signs a section 1138(c) consent, the burden of going forward and of proving that the tax is erroneous and a refund is due shifts to the taxpayer. A petitioner, under the facts here, can prevail upon a refund claim only by proof that the correct amount of tax is less than the amount set forth in the consent to tax.

Petitioner has offered no evidence to support a conclusion that the amount of tax it agreed to in the consent was not the correct amount of tax. Therefore, petitioner has not met its burden of establishing a right to a refund.

E. The petition of American Stock Transfer & Trust Co. is denied and the Division of Taxation's denial of petitioner's application for refund is sustained.

DATED: Troy, New York  
December 31, 2003

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup>It is noted that the Division did not issue a statutory notice of determination herein because the tax was made fixed and final by petitioner's execution of the consent. However, had petitioner not executed the consent, the Division would not have been precluded from issuing such a notice by the statute of limitations set forth in Tax Law § 1147(b).